IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.———

HIDEYOSHI NAGAYAMA, *Petitioner*,

v.

SHOKUWAN SHIMABUKURO (JESSE S. SHIMA).

BRIEF IN SUPPORT OF PETITION AND WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinions of the United States Court of Appeals for the District of Columbia is reported in 78 App. D. C. — Fed. (2nd) (R. 125-128). The trial judge wrote no formal opinions.

JURISDICTION.

Jurisdiction is founded in section 240 (a) of the Judicial Code as amended and which is quoted above in the petition. Also jurisdiction is provided on the grounds that the Appellate Court improperly construed Federal Rule 51 of Civil Procedure.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Appellate Court erred in raising a question of instruction of the trial judge for the first time after the case was presented on appeal and no objection to the instruction was made at the time of the trial nor was any objection made to the instruction by the respondent on appeal.

2. It is a violation of due process of law for an Appellate Court, on its own motion, to reverse a case on the grounds that an instruction to the jury by the trial judge was improper when no objection to the instruction was made at the trial of the case, nor on the appeal of the same, but was raised for the first time by the Appellate Court and not by the respondent.

3. It is a violation of due process of law for an Appellate Court not to give proper effect to the applicable decisions of the United States Supreme Court, other circuit courts and the local court.

4. That the instruction of the trial judge in the lower court was not improper.

5. This decision nullifies Federal Rule 51 of Civil Procedure.

SUMMARY OF ARGUMENT.

The petitioner maintains that this court should grant a Writ of Certiorari for the following reasons:

I. Conflict With Other Circuits.

We maintain that other circuit courts have held that a case cannot be reversed on appeal by an improper instruction unless an objection was duly made at the time of the trial of the case in the lower court.

In the case of *Sofarelli Bros. Inc.* v. *Elgin*, United States Circuit Court of Appeals, Fourth Circuit, July 22, 1942, 129-F (2nd) 785 at page 788 the court said:

> "Even, however, if the instruction on the subject of overhead be regarded as erroneous, Sofarelli is not in position to raise this question on appeal. No objection to this portion of the charge was made when Judge Coleman asked counsel for any exception to his charge. See Federal Rules of Civil Procedure, Rule 51: 'No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.''

Also in the case of *Hupp Motor Car Corporation* v. *Wadsworth*, 113 F. (2nd) 827, the court said:

> "No objection was made to the Court's charge on this point, and under Rule 51 of the Federal Rules of Civil Procedure, it is not reviewable."

Also the same point was covered in the case of *Armit* v. *Loveland*, 115 F. (2nd) 308, and *Krug* v. *Mutual Benefit Health Accident Association, etc.*, 120 Fed. (2nd) 296.

II. (a) This Decision Does Not Follow Applicable Decisions of the United States Supreme Court.

In the case of *Federal Trade Commission* v. *Algomal Company*, 291 U. S. 67, at page 73, when the Appellate Court ignored the testimony, the court stated as follows:

> "The findings of the Commission as to the facts, if supported by testimony, shall be conclusive. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the Court determined that the finding of unfair competition had no support whatsoever. *In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.* Statute & decision (Federal Trade Commission v. Pacific States Paper Trade Assoc., 273 U. S. 52, 61, 63, 71 L. ed. 534, 537, 538, 47 S. Ct. 285) forbid that exercise of power."

Also this court has ruled in the three following cases which we maintain are applicable to this case.

In the case of *Fleischmann Construction Co.* v. *U. S.*, 270 U. S. 349, 70 L. ed. 624, at page 357, the court said:

> "These are not open to review, as there were no special finding of fact and no exceptions to the ruling on matters of law were taken during the progress of the trial or duly preserved by a bill of exceptions."

In the case of *Pacific Exp. Co.* v. *Malin*, 132 U. S. 531, 33 L. ed. 450, at page 538, the court said:

> "While exceptions may be reduced to form and signed after the trial, they must appear affirmatively to have been taken before the jury withdrew from the bar, United States v. Carey, 110 U. S. 51 (28: 61), and cases cited."

In the case of *Palmer* v. *Hoffman*, 318 U. S. 109, at page 117 the court said:

> "He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted."

We maintain that the Court of Appeals, when it reversed the trial judge, improperly construed the case of *Hormel* v. *Helvering*, 312 U. S. 552, since they spoke of your petitioner's case as a "particular circumstance" and an "exceptional" case (R. 127), wherefore we maintain that this case does not come within the same category as it is only a collection case for money due, whereas in the *Hormel* v. *Helvering* case was an appeal from the Board of Tax Appeals in which the court, speaking of "exceptional cases," said:

> "The exceptions to the general practice is in accord with the *statutory authority given to courts* reviewing decisions of the Board of Tax Appeals . . ."

Therefore, we maintain that the court of Appeals improperly construed the above-entitled case in rendering its decision and thus this case should be reviewed by this honorable court.

II. (b) This Case in Conflict With Local Decisions.

We further maintain that this case is in direct conflict with the local decision of our United States Court of Appeals for the District of Columbia, since the law seems to be well settled that an objection to an instruction cannot be raised on the appeal unless the objection was taken at the time of the trial of the case. In the case of *Baltimore and Ohio Railroad Company* v. *Corbin,* 73 App. D. C. 124, at page 126, the court said:

> "We are not required to consider whether failure of the signals is in itself evidence of negligence on the part of the defendant, for Appellant made no objection to the instructions in this respect before the jury retired. See Rule 51, Federal Rules of Civil Procedure."

Also in the case of *Cohen* v. *Evening Star Newspaper* 72 App. D. C. 258, 113 F. (2nd) 523, and also in a very recent case and after the decision of the present case, the Court of Appeals in the District of Columbia ruled in *Mike Asha* v. *Charles Goldstein et al.,* decided on February 14, 1944, 78 App. D. C....., the court stated as follows:

> "The sole ground of appeal is an alleged error of the court below in instructing the jury. Appellant made no objection to the instruction at the trial and, therefore, under rule 51 of the Federal Rules of Civil Procedure the judgment will be affirmed."

The Court of Appeals for the District of Columbia has long held that questions of facts should be decided by the jury and has also held in the case of *Christie* v. *Callahan,* 75 App. D. C. 133, near the bottom of the page 148, the court said:

> "Unfortunately the case is one in which, as it comes to us, it is necessary to hold that the jury was justified in ignoring important and, in some respects, undisputed testimony. That would have been true, whatsoever its verdict. None could have been rendered which would not have ignored important, convincing and crucial evidence, given, as we think, by honest and honorable witnesses. *It is in just such cases that courts are required to keep hands off the jury's business.* We must do so here.
>
> The judgment is affirmed."

Therefore, we maintain that your petitioner was denied due process of law by the failure of the Appellate Court to follow the local applicable decisions.

III. This Decision Nullifies Federal Rule 51 of Civil Procedure.

This rule has been quoted and cited in the above, therefore, we maintain that this case nullifies Federal Rule 51 as an Appellate Court is not allowed to reverse a judgment of the lower court on the grounds that an instruction was erroneously made when there was no objection made to the same.

We further maintain that the rules of court have the same force and effect as statues of law and therefore binding on the courts as well as any parties to a case. This seems to be a well established principle of law and we feel does not need the citing of any case to support the same.

CONCLUSION.

In conclusion, we rest this case on the grounds that the Appellate Court denied the petitioner due process of law when the petitioner was taken by surprise when an objection was raised on appeal the first time when no exception was taken to the same at the time of the trial. Also, the Appellate Court has not given proper effect to the applicable decisions of this court by claiming that the petitioner's case is "exceptional" or "particular circumstances" to warrant a reversal. Therefore, we maintain that this court should grant a Writ of Certiorari so that the petitioner may have his case heard and determined by an Appellate Court as will assure him due process of law.

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